IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF OF THE STATE OF NEW YORK, *AMICUS CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of
New York, Amicus Curiae
2 World Trade Center
New York, New York 10047
(212) 488-7561

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Assistant Attorney General
of Counsel

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Interest of the *Amicus*

This brief is submitted by the State of New York in support of affirmance of the order of the New York Court of Appeals in this litigation of profound signifiance to the State of New York and the distinctiveness and heritage of its major city.

The protection of the architectural integrity of New York's world-famous Grand Central Terminal as a landmark for the use, education, and inspiration of the inhabitants of New York City and its many thousands of

daily business, vacationing and other visitors is a concern vital to the interest of the State, as is New York's interest in upholding the constitutionality of the New York City Landmarks Preservation Law.

Indeed, the State empowered the City to enact such legislation in an enabling act, General Municipal Law § 96-a, which specifically authorizes the City to protect and enhance buildings "having a special character or special historical or aesthetic interest or value." New York City's farsighted landmarks preservation legislation is an important and valid exercise of the police power, emulated by numerous other municipalities in New York and throughout the nation. The loss or crippling of this legislation would be devastating to the quality of life in this metropolis and cultural, artistic and commercial center—a loss far transcending the architectural debasement and inevitable coarsening of the terminal and surrounding area which would also result.

New York City has witnessed the demise over the years of many splendid buildings which were examples of great artistic and architectural design, such as the original McKim, Mead and White Pennsylvania Station—blows to the vitality and uniqueness of the City which led to the enactment of the very landmark law here under attack. There has since been developing, in New York and in many other cities as well, a keen public awareness of the importance and significance of these edifices, not only architecturally and historically but in terms of the sheer identity of the City and the perception of it as a separate entity different from any other. The economic consequences alone—all else aside—of the loss of this attraction would be devastating to New York City's magnetism as a tourist, commercial and artistic hub. Unfortunately, once destroyed, historic landmarks can never be replaced—only reproduced artifically, such as has been done at Williamsburg and Sturbridge Village, at astronomical expense.

A great city's identity is inextricably interwoven with its landmarks. Rome is famous for its Colosseum, London for the Houses of Parliament and St. Paul's, New Orleans for its French Quarter, an entire district legally protected from ravaging in the name of "development." See *Maher* v. *City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. den. 426 U.S. 905, discussed *infra*. Charleston, Richmond, Savannah and other cities rich in architectural heritage have taken similar steps to protect this asset—steps which the ratification of the radical views of the plaintiffs would endanger.

New York's rich history is reflective of the enormous amount of time, money and talent invested in building up its unique architectural heritage. The Brooklyn Bridge, the New York brownstone, the Metropolitan Museum of Art, the Public Library and Grand Central Terminal are each important and irreplaceable components of the special uniqueness of New York City. Stripped of these historic structures, New York would be indistinguishable from numerous other cities whose steel-and-glass skylines today are as ubiquitous as their fast-food establishments. A nation devoid of architectural individuality is a land deprived of uniqueness and of the consciousness of heritage which engenders pride in one's surroundings—a land whose inhabitants, like Frost's hired man, would have "nothing to look backward on with pride, nothing to look forward to with hope."

A traveler arriving at Grand Central Terminal, or approaching it from the City's nearby streets, encounters one of New York's greatest attractions—a dramatic building which functions more efficiently than most modern railroad terminals in America. The importance of preserving this great station is not only cultural and historical but economic as well since it constitutes a major tourist attraction, beckoning innumerable visitors into the heart of the metropolis, contributing to the City's economy in innumer-

able ways. Grand Central, owned by a government supported corporation, is a terminal for hundreds of trains each day which are operated with federal, state and Metropolitan Transportation Authority funds.* It is truly a public building in every meaningful sense. As stewards of this vital structure, the officers of the Penn Central have no more constitutional power to destroy or deface it in contravention of the City's determination that it is a landmark than they would to tear up its tracks.

Historic landmark preservation is gaining momentum throughout the United States. Laws designed to preserve historically and culturally valuable structures have been enacted in some ninety jurisdictions and upheld in all states where the matter has been tested in court. See, *e.g., Opinion of the Justices to the Senate,* 333 Mass. 783, 128 N.E.2d 557 (1955); *Matter of Sailors' Snug Harbor* v. *Platt,* 29 A D 2d 376, 288 N.Y.S. 2d 314 (1st Dept. 1968); *Maher* v. *City of New Orleans, supra,* 516 F.2d 1051. Without legislation of the sort here under attack the bulldozer would deprive our cities of individuality in short order.

Appellants' assault here is not merely on the City's designation of Grand Central Terminal as a landmark—a determination fully warranted by the facts and unassailable here. They are in fact striking a blow at the City's landmarks law and the State's basic police power as it applies to zoning and the use of land. For if appellants' broad definition of what constitutes a taking is adopted, land-use restrictions of all kinds are in jeopardy wherever

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* Federal recognition of the need to preserve terminals such as Grand Central was expressed in the 1974 Amtrak Improvement Act, 49 USC § 1653(i)(7), as noted by the state court in this case, which directs Amtrak to "give preference to using station facilities that would preserve buildings of historical and architectural significance." The irony which would result from allowing the ravaging of Grand Central in the face of this statute needs no underscoring here.

they result in a mere diminution of value of the property regulated, and however much the public is entitled to protection from the destruction of its heritage.

The State of New York is vitally concerned in this. Not only does the City constitute New York's metropolis and a magnet for hundreds of thousands of tourists and business visitors, but the effectiveness of State legislation, as well as laws in other cities, to protect landmarks would be weakened by adoption of the retrogressive views advanced by appellants. Legislation has been introduced to furnish New York State with landmark preservation authority along lines generally comparable to that of the City to provide needed protection for irreplaceable structures throughout New York.

Congress has also recognized the importance of safeguarding historic landmarks, so that appellants' attempt to overturn the city ordinance runs directly counter to the Congressional intent expressed in the National Historic Preservation Act of 1966, 16 U.S.C. § 470 ("to assist State and local governments • • • to expand and accelerate their historic preservation programs"); the National Environmental Policy Act, 42 U.S.C. § 4321 (enunciating a national policy to preserve "important historic • • • aspects of our national heritage"); and with precise relevance here, the Amtrak Improvement Act of 1974, 49 U.S.C. § 1653 (i)(7), *supra,* directing Amtrak to "give preference to using station facilities that would preserve buildings of historical and architectural significance."

It is accepted now that the environment consists not merely of trees and watercourses but includes the quality of urban life as well. As Winston Churchill expressed it, in rejecting a now-unthinkable 1943 plan to replace the Houses of Parliament with a modern structure, "We shape our buildings, and afterwards our buildings shape us." *Onwards to Victory* (1944), pp. 316-318.

Rene Dubos in *So Human an Animal* (pp. 193-194) quotes the words of Lewis Mumford, peculiarly applicable here:

> "If man had originally inhabited a world as blankly uniform as a 'high-rise' housing development, as featureless as a parking lot, as destitute of life as an automated factory, it is doubtful that he would have had a sufficiently varied experience to retain images, mold language, or acquire ideas."

As Dubos himself notes, *id.* at 198:

> "As to our cities, no planning will save them from meaningless disorder leading to biological decay, unless man learns once more to use cities not only for the sake of business, but also for creating and experiencing in them the spirit of civilization."

The legislation which appellants here seek to undermine represents a large step in the direction of retaining that human spirit of which Dubos speaks. To sweep this statute aside would serve to stifle that movement among our cities and states to preserve the fabric of urban life, just when its importance has come to be broadly recognized.

Grand Central Terminal and its Landmark Designation

The Landmarks Preservation Commission, in announcing the designation of Grand Central Terminal as a landmark on August 2, 1967, described it as "a magnificent example of French Beaux Arts architecture [and] one of the great buildings of America." It found the building to be a "skillful combination of architectural elements," creating "a building overpowering in its timeless grandeur"

(J.S.A. 20a-21a).* Significantly, although appellants now see fit to describe the designation as having been made "over the objection of the Penn Central" (Br. p. 4), they did not challenge it until a year later.

Grand Central has been a railroad terminal since 1871. The present building was the result of a 1903 comprehensive plan of Penn Central's predecessor, the New York Central Railroad, which proved to be so farsighted in solving the logistic problems facing the railroad in New York City that today, nearly three-quarters of a century later, the Terminal remains one of the best functioning such facilities in the country. Besides providing for effective traffic flow, the structure was envisioned to be, and still is, an impressive point of arrival and departure for passengers in the heart of New York City, with its main concourse measuring 120 by 375 feet with a vault 125 feet high at its apex. This vault is "one of the noblest in America—surpassed only by the great glass and metal vaults of now-vanished Pennsylvania Station," as described by the New York State Office of Parks and Recreation, Division for Historic Preservation, in *Grand Central Terminal and Rockefeller Center, A Historic Critical Estimate of their Significance,* 5. The Terminal, particularly its Concourse, was designed to provide the passenger with a total sensory experience (*id.*):

> "With the great sonorous echoes of the train announcers—so exciting for travellers to hear and so difficult for them to understand—this Concourse became the very symbol of the excitement of travel for generations of Americans."

So significant was the creation of Grand Central Terminal for urban and architectural ideas that even before its opening it was hailed as "the greatest railway terminal in the world." Robert A. Pope, "Grand Central Terminal Station," *The Town-Planning Review,* Univ. of Liverpool, II (April, 1911), 59.

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* References are to Joint Appendix.

Today, despite years of downgrading and neglect by appellant Penn Central and its predecessors, Grand Central remains a splended edifice and a major part of the cultural and architectural heritage of the City of New York. Grand Central still maintains its original splendor, especially from the southern view, looking up Park Avenue—the very approach which the proposal at bar would damage. Although the Terminal has succeeded in absorbing the large increase in the amount of people moving through its concourse to the offices of the Pan American building, erected in 1958, further illustrating its well planned and farsighted design, it is difficult to envisage the Terminal successfully coping with yet another massive office building on its back.

The present attack on the Terminal was mounted on June 20, 1968, with two proposals to build a 54-story tower directly over the Terminal's waiting room—the subject of the present litigation. The proposed office space is intended for rental, not for the Penn Central's own use. This plan which, as amended by its proposers, would require destruction of the monumental 42nd Street facade of the Terminal, was quite properly rejected by the Commission. The City, however, allowed the Penn Central to transfer its development rights to its contiguous property containing the Biltmore Hotel. Although this alternative was consistent with the preservation of the Terminal and allowed appellants to build the desired office space on another valuable piece of adjacent commercial property, the railroad and realty corporations refused to implement this proposal. They chose instead to use the Commission's recognition of Grand Central as a landmark—a fact so patent that even appellants do not dispute it—as a vehicle to undermine the entire Landmark Preservation Law, taking an archaic and discredited extreme view of substantive due process invalidating reasonable economic regulation under the police power which this Court has consistently rejected since the mid-thirties.

Ironically, the result sought by appellants, the annihilation of the City's authority to preserve the architectural landmarks which constitute its heritage and urban distinction, as applied to one of the most priceless of those landmarks, would in a short time reduce the very property values which appellants extol above all public considerations. Appellants' true position, for all their insistence on the rights of the property owner, is, in Othello's words, that of one seeking to throw away a jewel richer than all his tribe.

Summary of Argument

The New York appellate courts properly held that the designation of Grand Central as an architectural landmark and rejection of the Penn Central's plan to place a skyscraper astride it were well within the broad discretion afforded the municipality under the police power. The state courts found as a fact that the owner was in fact earning a reasonable return on the building. That, coupled with the city's specific offer of transferred development rights, fully satisfied the requirements of due process on this record.

Appellants would now segregate their air rights from the worth of the structure itself and contend the "confiscation" of these separate air rights mandates payment. In fact the air rights are part and parcel of the value of the building. Unlike the inverse condemnation cases relied on by appellants, *Griggs* v. *Allegheny County*, 369 U.S. 84, and *United States* v. *Causby*, 328 U.S. 256, they retain full and unhampered use of their present property, which earns a reasonable return, as the state courts found. Under the police power no more is required.

There has been no "taking" here. The municipality has broad discretion to determine land use within its own confines, upheld repeatedly by this Court even against right of

privacy, First Amendment and racial discrimination claims which the Court has consistently held entitled to far more weight than the purely economic considerations here voiced. See, e.g. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1; *Young* v. *American Mini Theatres,* 427 U.S. 50.

Despite appellants' distortion of this case it is not an eminent domain case. The city has "taken" nothing in the Fifth Amendment sense. It has restricted appellants' use of the property as have municipalities in numerous zoning and other land-use decisions, limiting certain options and providing others in return. So long as appellants continue to be able to earn a reasonable return on their property as an entity—an issue resolved in the City's favor below and not before this Court—there is no constitutionally-proscribed "taking," any more than there would be where one is denied the right to erect a factory or skyscraper in an area otherwise zoned, or on a wetland or other legally protected area.

Finally, the claim of discrimination and the analogy to "spot zoning" are faulty. Landmarks need not be geographically contiguous to be protected. The city has a reasonable, comprehensive plan to protect landmarks within its jurisdiction. Unless utterly irrational this economic classification is constitutionally valid, *McDonald* v. *Board of Election Com'rs,* 394 U.S. 802.

ARGUMENT

The City's determination denying Penn Central's application to build a skyscraper atop Grand Central Terminal, a classified architectural landmark, was a valid exercise of its broad power to prevent unsuitable land use, and abridged no constitutionally protected right of the appellants.

A.

This is not an eminent domain case. Appellants own a building and have owned it for decades. They never sought to construct an office building above it until after it had been declared an architectural landmark by the City. Further, the Penn Central failed to even challenge the City's determination which it now so strenuously opposes until a year later when its skyscraper proposal was denied approval. The air rights of which appellants speak as if they were a separate parcel are no more than an integral part of the property which the state courts expressly found was earning a reasonable profit. The Penn Central is like any other landowner whose right to build to the sky has been curtailed. This is, as this Court has held consistently, a restriction consistent with the municipality's wide discretion under the police power. As the Court recently expressed it in *Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 (n.8),

> "By its nature, zoning 'interferes' significantly with owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his capacity is insufficient to invalidate a zoning ordinance • • •.'"

Appellants attempt to overlook these fundamental principles, firmly part of our law since *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, by seizing on the observa-

tion of Chief Judge Breitel below that "[t]his is not a zoning case" (J.S.A. 5a). But for the purposes of the police power this is a distinction without a difference. The constitutional question with any municipal land-use regulation is whether it is a rational control that does not effectively render the property worthless. *Steel Hill Development Co.* v. *Town of Sanbornton,* 469 F. 2d 956, 963 (5th Cir. 1972). On this record appellants totally failed to prove a violation of that rule. See *Young* v. *American Mini Theatres, supra,* 427 U.S. 50, 78:

> "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage."

The broad power of the municipality to control land use within its borders has been noted by this Court on countless occasions, even as against claims of First Amendment deprivations to which this Court has ever been keenly alert, and which are totally absent here where the statute's impact is of an economic nature only.

In *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. 1, the ordinance was challenged as violative of the residents' freedom of association and right of privacy. This Court upheld it despite its conceded strong economic impact on existing property values—totally absent here where the only serious claim is of reduction of the value of unused air rights appurtenant to an existing profitable building. The Court held (p. 9):

> "Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their

> place; it is obvious that the scale of rental values rides on what we decide today."

Justice Marshall's dissent in *Belle Terre,* based on freedom of association, took the same broad view of the municipality's power to regulate land-use (p. 13):

> "[D]eference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms."

With extraordinary pertinence here, he described land-use regulation (*id.*) as perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

Similarly, in *Young* v. *American Mini Theatres, supra,* the Court sustained Detroit's ordinance curtailing "adult" theatres and bookstores as against a claim of denial of free speech, in the ambit of constitutional rights far higher on the scale of protection, as this Court has over and over again held, than those here involved. *Dombrowski* v. *Pfister,* 380 U.S. 479; *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 24, 44; *United States* v. *Carolene Products,* 304 U.S. 144, 152.

Goldblatt v. *Town of Hempstead,* 369 U.S. 590, is also instructive here. There the Court held (p. 592):

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's

police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."

Goldblatt carries us much further than we need go here, for in that case the law halted an ongoing profitable use. There has never been a decision of this Court, or of any state appellate court of which we are aware, holding that a municipality may not, by legislation for a valid purpose, restrict an owner's right to build to a height greater than the law permits.

B.

Appellants' attempt to finesse these basic rules by arguing that the Landmark Preservation Law is arbitrary, and the equivalent of spot zoning, does not withstand scrutiny. The purpose of New York City's landmark-protection legislation is the safeguarding of the buildings the Commission finds, after public hearings, to be landmarks. Whether, as in some smaller cities, these buildings are contiguous in a district, or whether as in New York or Boston they are at various locations, does not alter the aim of the legislation. Spot zoning is by definition the absence of any comprehensive plan. Here there is not only a statutory comprehensive plan (J.S.A. 25a) to protect architectural and historic landmarks but an explicit legislative finding in the statute as to the importance of this purpose for the City's economic well-being and future. It would be anomalous and indeed discriminatory to argue that the buildings in the historic districts of Greenwich Village and Brooklyn Heights are entitled to protection under the Constitution but that Grand Central is not. Yet that is where appellants' argument leads.

The analogy with discriminatory spot zoning amounts to a claim that this—and any other—legislation protecting individual landmarks is a denial of equal protection. Under basic principles economic regulatory legislation is

to be sustained as against such claims unless the legislative classification is totally irrational. *McDonald* v. *Board of Election Com'rs, supra,* 394 U.S. 802. Where, as here, the statute contains express criteria for designating a landmark and provisions for public participation and judicial review, and where the Penn Central did not even contest the designation, such a contention is a make-weight. See *City of Highland Park* v. *Train,* 519 F. 2d 681 (7th Cir. 1975), sustaining municipal approval of a shopping center complex as against equal protection claims by nearby residents, and holding (p. 697):

> "Zoning is not rendered unconstitutional by the fact that any direct benefit the plaintiffs may receive from it is less than the possible burdens it may impose upon them."

As one might expect, the courts in sustaining landmark protection laws have not discriminated between those in districts and those which are not. The recent *Maher* v. *City of New Orleans,* dealing with a protected district, the French Quarter, held, 516 F. 2d 1051, 1065:

> "The Supreme Court repeatedly made clear that an ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential."

Matter of Sailors' Snug Harbor v. *Platt,* 29 A D 2d 376, 288 N.Y.S. 2d 314, *supra,* and *Manhattan Club* v. *Landmarks Preservation Commission,* 51 Misc 2d 556, 273 N.Y.S. 2d 848 (Sup. Ct. N.Y. Co. 1966), both sustained Commission determinations as to buildings not in a historic district. In the former (29 A D 2d at 377) the Court held "no longer arguable • • • the right, within proper limitations, of the State to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community." See also *First Pres-*

byterian Church of York v. *City Council,* 360 A. 2d 257, 25 Pa. C. 154 (1976), upholding a landmark ordinance as against a tax-exempt corporation located in a historic district, and noting that the test is whether the act precludes the use of the building for any purpose for which it is reasonably adapted.

Appellants' radical view of substantive due process would throw into reverse gear this entire process of safeguarding these irreplaceable facets of our heritage. The narrow grudging view of the police power they espouse and the enshrinement of the right of the property owner to maximize his profits at the expense of all other values are a throwback to the days of *Lochner* v. *New York,* 198 U.S. 45, and similar cases. In that case Justice Holmes, dissenting, trenchantly observed (at p. 75) that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Nor did it enact the views of the commentators cited by appellants on the appropriateness of one or another form of landmark protection. As this Court has consistently held, the wisdom of state and municipal statutes in the economic field is not for the courts. *Ferguson* v. *Skrupa,* 372 U.S. 726; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483; *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156. Appellants are not constitutionally guaranteed the right to obtain the maximum profits from their land to the exclusion of all other considerations. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 424; *Breard* v. *City of Alexandria,* 341 U.S. 622, 632. See also *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 58; *Dean* v. *Gadsden Times Publishing Corp.,* 412 U.S. 543, 544. "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168.

There is no more appropriate area for state and municipal legislation than that of local land-use, as to which

"deference should be given to governmental judgments" regarding "the most essential function performed by local government, • • • one of the primary means by which we protect • • • quality of life." *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. 1, 13, 15 (MARSHALL, J., dissenting). Under these time-honored principles the state courts properly sustained the statute's application here.

C.

Recognizing the extreme nature of their position, appellants seek to paint this case as one in which a different rule for landmarks is established. But that is not the case. The City's law is valid under the traditional police power rules within which this Court has steered for decades. Once it is proven that the owner is capable of earning a reasonable return, constitutional inquiry as to an economic regulation ends. Appellants' assertion (Br. p. 8, n. 7) that "Penn Central presented substantial evidence that it could not earn • • • a reasonable return" is fantastic. The New York courts expressly found as a fact that Penn Central failed to show Grand Central was incapable of producing a reasonable return (J.S.A. 10a-11a, 13a, 24a-25a), in addition to the immensely profitable Hotel Biltmore and other surrounding properties owned by it, whose profits are augmented by proximity to Grand Central.

Likewise, appellants' portrayal of this as a "taking" case, as if it were eminent domain, is unwarranted and misleading. The New York courts found to the contrary (J.S.A. 5a, 12a), and even in the eminent domain context the firmly established rule is that all benefits and injuries should be considered in relation to an owner's property as a whole and not solely in relation to the part taken. This Court has stressed the necessity of deducting benefits to a landowner's remaining land in any calculations to estimate compensation, "even if the result should be to leave nothing payable to the owner." *Bauman* v. *Ross,* 167 U.S. 548, 568. The Court there recognized that compensation should be in

part determined by what has been gained by a landowner because of the interests of the public (p. 570):

> "Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual."

See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-151. Here, appellants' other property in the same vicinity has increased in value not only because of the availability of transferred development rights but also because of their proximity to the terminal and the wealth of transportation connections, all publicly subsidized, which converge there.

Despite appellants' reliance on *Bauman* v. *Ross, supra,* they nevertheless insist on trying to separate the "taking of their air rights" from consideration of the worth of their property as a whole. However, the landmark statute's definition of the parcel designated as a landmark, termed an "improvement parcel," specifically includes the unimproved as well as the improved portions of such property so long as it is treated as a single entity for the purposes of levying real estate taxes (J.S.A. 79a). Under this definition, the undeveloped air rights above Grand Central are clearly inseparable from the Terminal building, as they have never been treated as a distinct entity for such tax purposes. Penn Central cannot reap the rewards of years of tax assessment of Grand Central, including the undeveloped areas of the property, as a single entity, and now argue that there have always been *two* entities, separating the developed portion of the site from the undeveloped air rights.

Further, the cases cited by appellants do not support their contention that a taking of air rights should be considered in isolation to determine compensation. Both *United States* v. *Causby, supra,* and *Griggs* v. *Allegheny County, supra,* involved airplane flights over property

which were at such a low altitude they destroyed the present utility of the underlying property. These flights were judged to be takings not because of any interference with the plaintiffs' "air rights" but because in the former case, the frightening noise and glaring lights of the planes economically destroyed what had previously been a productive chicken farm, and in the latter case, they rendered residential property uninhabitable by the noise and danger of the low-flying planes, some of which had crashed in the vicinity. In contrast, it would be ludicrous for Penn Central to claim it has been prevented in any way from continuing its present usage of the Terminal by its designation as a landmark.

The remaining case cited by Penn Central for the proposition that it should be compensated is similarly inapposite. In *United States* v. *29.28 Acres of Land in Wayne Township, New Jersey,* 162 F. Supp. 502 (D.N.J. 1958), the Government was required to pay only nominal fees for line-of-sight easements, and this *de minimis* compensation was in proportion to the number of trees on the property that had to be "topped." There is nothing in that decision to support appellants' claim that the owners there had to "substantially restrict their rights to develop the property" (Br. p. 16); in fact, the court explicitly noted that the "cloud" on the property titles was only theoretical, and that at least one of the properties had actually increased in value. Yet appellants rely on that case here where they are demanding exorbitant compensation for a "loss" that has required absolutely no physical destruction or interference with any structure on their property.

D.

Appellants make much of the reference by the Court of Appeals to the public subsidies and tax abatements awarded the Penn Central over recent years, as well as the publicly operated subway lines which converge at Grand Central and add to its value. The disposition of this case

would be the same were these factors not considered. Indeed, the Appellate Division sustained the validity of the application of the landmark law to the building, without addressing any of those elements, on the inability of the railroad to prove it could not earn a reasonable return. This is the nub of the case and the reason why so much of appellants' argument is academic here. Under basic principles this Court need not, and therefore should not, decide the rights of one found as a fact to be able to earn a reasonable return on his investment. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-348 (BRANDEIS, J., concurring); *United States* v. *Raines,* 362 U.S. 17, 21-22; *Bowen* v. *United States,* 422 U.S. 916, 920.

Moreover, the reasoning supplied by the Court of Appeals as an alternative to its holding that proof was wanting was fully valid. Appellants offer no reason why the courts should blind themselves to the publicly-financed advantages furnished the Penn Central, in contrast to ordinary landowners, which distinguishes it utterly from the owners of rural property and family homes in the cases on which it relies. The fact is that the test used by the Court of Appeals was the standard test used in this area—was the property capable of earning a reasonable return? The finding that it was is conclusive here.

In this connection, appellants' reliance on *United States* v. *Fuller,* 409 U.S. 488, is strange. In that case, an eminent domain case, the Government was held *not* required to pay for the value of the landowner's permit to graze on adjacent Government land, which the Court described (p. 491) as "a value which the government itself created and hence in fairness should not be required to pay." It is difficult to see how that case furnishes authority for the appellants' views. At most, dicta in that case allude to "the value added to property by a completed public works project, for which the Government must pay" (*id.* 492). But here the benefits conferred on the Penn Central were

totally different—tax abatements, subsidies and the like, all far more similar to the permit held not properly part of the value of the land.

Finally, it should be noted that, as the appellees' brief points out, even were the ordinance ruled to be unconstitutional—a claim which the state courts found appellants fell far short of satisfying their heavy burden of proving—that would not warrant the conclusion that a compensable taking occurred. See *Fred F. French Investing Co.* v. *City of New York,* 39 N Y 2d 587, 350 N.E. 2d 381 (1976), app. dism. for want of substantial fed. question, 429 U.S. 990; *Pope* v. *City of Atlanta,* 418 F. Supp. 665 (N.D. Ga. 1976).

The appellant Penn Central's inability to prove itself incapable of earning a reasonable return, found as a fact by the state appellate courts, removes the constitutional dimension from this case. The last-ditch attempt to portray this as an eminent domain case blatantly ignores the factual findings below and forty years of decisions broadening the police power of the municipalities, notably in the land-use area. The anachronistic view of the police power asserted by appellants would subvert state and local government legislation protecting historic landmarks as well as a host of other ordinances regulating the use of land and buildings. It does not deserve judicial sanction.

CONCLUSION

The order of the Court of Appeals should be affirmed, or in the alternative the petition should be dismissed.

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Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of
New York, Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Assistant Attorney General
of Counsel